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80-1096

No.:_____

IN THE

Supreme Court of the United States

October Term, 1980

LEONARD AIKEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Was Petitioner's Sixth Amendment Right to the Assistance of Counsel Violated by the Failure of the District Court to Suppress Petitioner's Post-Arrest Statements?

2. Was Petitioner's Fifth Amendment Right to Due Process of Law Violated by the Failure of the District Court to Grant Petitioner's Motion for a Pre-Trial Hearing Concerning the Government's Voice Identification Procedures?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Leonard Aiken prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction against the Petitioner by the United States District Court for the Southern District of New York.

Opinion Below

Following the entry of the judgment in the District Court, Petitioner appealed to the Court of Appeals for the Second Circuit. The unreported opinion of the Court of Appeals may be found in the appendix annexed to this petition at 1a to 6a.[1] Petitioner did not seek rehearing or suggest rehearing *en banc.*

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was November 10, 1980, which also was the date of entry. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

Constitutional Provisions Invoked

1. The Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States.

These constitutional provisions are set forth in Petitioner's appendix at 7a.

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[1] "A" refers to the appendix annexed hereto which contains the judgment of the United States Court of Appeals for the Second Circuit and the relevant constitutional provisions involved herein. "T" is a reference to the two-volume appendix heretofore submitted to the United States Court of Appeals for the Second Circuit. These volumes, which contain *inter alia* pre-trial and trial testimony, pleadings, and exhibits, will be certified to this Court.

Statement of the Case

1. Introduction

On February 7, 1980, the government filed indictment No. 80 CR 70 which charged that from November 1978 through February 1980 Petitioner and one Benjamin Starckey[2] conspired with each other to distribute and possess with intent to distribute heroin and cocaine.

2. The Prosecution's Case

Joyce Finch, who, during the period of March and April 1979 was employed as a barmaid at the 400 Club located at 148th Street and St. Nicholas Avenue within the City of New York, testified that she believed that Benjamin Starckey owned the Club (T. 375). She recalled that in March and April of 1979, David Reeves came to the Club and so did the Petitioner "once or twice a week" (T. 379-380). She recalled that on "several occasions" she saw Reeves, Petitioner, and Starckey conversing in the Club (T. 380). On cross-examination, she conceded that she could not recall precisely when Petitioner had spoken with Reeves; that she had not actually overheard any of the conversations; and that she had no independent recollection of the conversations. Indeed, she testified that she had indicated to the prosecution that the conversations had taken place in March and April simply because the prosecution had suggested March and April (T. 389-390).[3]

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[2]Starckey was named with Petitioner as a defendant in the one-count indictment. Starckey, a/k/a "Skippy" (hereinafter "Starckey"), received a sentence of six and one-half years. Petitioner, on parole at the time of his conviction, was sentenced to a term of imprisonment of 20 years and is presently incarcerated.

[3]Finch's time-frame testimony was particularly crucial in this case since the lynchpin of the Government's case against Petitioner *concededly* consisted of two tapes allegedly made at the 400 Club on April 12 and April 18, 1979, which conversations

(footnote continued on following page)

Before the Grand Jury, Finch had been asked, "You remember in April, roughly on or about April 18, but in April, somebody came in and gave a summons to the 400 Club for not having -- because their license had expired?" Finch had responded, "I got it" (T. 642). At trial, on re-direct examination, the prosecutor attempted to establish that Finch's recollection of when the conversations had taken place in the Club was predicated not upon the suggestion of the prosecution, as the defense had established on its cross-examination of Finch, but rather upon her recollection of the conversations having taken place at or about the time she had received a summons for selling liquor without a license (T. 391-392). It was only after Finch and two additional prosecution witnesses had testified that the defense discovered that the critical summons had actually been issued on March 14, 1979 -- not in April -- as the prosecution had asserted both before the Grand Jury and at trial during the testimony of Finch -- and that the prosecution knew or should have known of this crucial fact (T. 640-686).

John DeRosa of the Drug Enforcement Task Force next testified for the Government.

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the Government attributed to Reeves, Starckey, and Petitioner. Reeves, a Government informant in this case and unrelated matters who allegedly taped the incriminating narcotics conversations, died prior to trial and was, therefore, unable to testify for the Government as to the conversations (T. 603-604). At trial, no Government surveillance witness was able to testify that he had ever seen Petitioner enter the Club where the alleged conversations took place on April 12 and April 18, although a rebuttal witness for the Government testified that he observed Petitioner exit the Club on April 18, and no prosecution witness other than Finch had ever observed Reeves speaking with Petitioner. Petitioner hotly disputed that he was, in fact, the speaker in the conversations and as will be shown more fully below, his defense at trial was predicated upon creating a reasonable doubt that it was his voice on the tapes.

In January, 1979, DeRosa arrested Reeves who thereafter became an informant (T. 403-405). Until the arrest of Petitioner and Starckey, DeRosa conducted surveillance, near the 400 Club.[4] On April 12, Officer DeRosa, together with another officer, met Reeves in Queens, where they outfitted him with a Nagra recorder and a Kel Transmitter, gave him $500 and directed him to return to the Club.[5] Later, DeRosa observed Petitioner's car parked in the vicinity of the Club and at about 5:30 p.m. saw a male "who resembled" Petitioner enter the Club. About 15 minutes later, he noticed that Petitioner's car was gone and that shortly thereafter, Reeves was back in his own car (T. 401-416). DeRosa then removed the Nagra and its tape from Reeves, which tape was received in evidence (GX-2, T. 418).

On April 18, DeRosa and other police officers met Reeves under the West Side Highway in New York City. Again, a Nagra recorder as well as a Kel Transmitter was placed on Reeves and he was given $6,200 in Government funds. At about 5:00 p.m. Reeves, at the direction of the police, arrived at the Club. Though DeRosa did not personally make any observations, at about 6:45 he met Reeves who gave him the Nagra and its tape, the Kel, and $5,000 of the $6,200 (T. 419).[6]

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[4]The Government asserted that the critically probative events and conversations occurred at the 400 Club located at 400 West 148th Street. Much of the surveillance testimony, however, concerned Petitioner allegedly entering another establishment at 405 West 148th Street, which did not figure in the indictment (A. 657).

[5]The Kel malfunctioned, allegedly because of a defective battery, and the Government withdrew its offer of Reeves' transmission (A. 418).

[6]The Government asserted that the tapes revealed that the payments by Reeves were for prior narcotics transactions (T. 24).

At 7:30 that same evening, DeRosa again met Reeves, outfitted him with a Nagra, and gave him $5,000. As previously, DeRosa did not personally make any observations. At about 8:45 he met Reeves, removed from Reeves the Nagra and its tape, and received from Reeves the $5,000. The tape of the two April 18, 1979 conversations was received in evidence together with transcripts of each of the conversations (GX-2, 2A, 3, 3A, 3B, 4; T. 425, 463-464).[7]

Subsequently on January 7, 1980, a complaint against Petitioner was filed and a warrant for his arrest issued. DeRosa testified that on February 5, 1980, at 8:00 a.m., Petitioner surrendered at the office of the Drug Enforcement Administration as per agreement between DeRosa and Petitioner's attorney. Petitioner was then advised of his constitutional rights and after being booked was taken to the office of Assistant United States Attorney Denton, where he was again interviewed in the presence of DeRosa and another police officer after again being advised of his rights by Denton. After being shown a copy of the complaint against him and being informed that the Government had him "good...on two or three tapes talking dope deals," Petitioner stated, "I know I am in trouble" (T. 435).

Prior to February 5, when Petitioner surrendered, DeRosa had never met Petitioner. On February 5, DeRosa spent about four hours with him and testified that he had had an opportunity to listen to Petitioner's voice for 45 minutes to an hour (T. 435). On this basis, he attributed the voices of the speakers on the tapes to be those of Reeves, Petitioner, and Starckey and stated to the jury that he had no doubt whatsoever as to the correctness of his attributions (T. 467-471).

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[7]On April 19, the scenario was repeated by DeRosa and Reeves, who this time did not enter the 400 Club. The April 19 tape was received in evidence as GX-4 (T. 425).

On cross-examination, DeRosa conceded that notwithstanding the Government's assertion that Petitioner was at the 400 Club on April 12 speaking about narcotics, he, DeRosa, had been captured on a Kel transmission to Reeves stating that he, DeRosa, "did not see Leonard Aiken, the Petitioner, go into the 400 Club at about 6:00 that night"; that in point of fact he had, himself, never seen Petitioner enter the 400 Club; and that he had never seen Petitioner speak with Reeves (T. 476, 487, 505).[8] Moreover, he conceded that although Reeves repeatedly referred to "Leon" -- Leonard Aiken -- on the tapes, there was, in fact, no evidence independent of Reeves' assertions to establish that Reeves had actually been conversing with Petitioner (T. 526-528).

Alphonse Ripandelli, also assigned to the Drug Enforcement Administration, testified for the Government.

He stated that on February 5, 1980, he had occasion to take Petitioner from Assistant United States Attorney Denton's office to the office of the pre-trial services. As they were walking through a tunnel beneath the courthouse, Ripandelli told Petitioner that it was a point in his favor that he had seen fit to surrender. Ripandelli recalled that Petitioner then responded that "if he was any younger, he would still be running" (T. 634-635). Ripandelli further testified that he believed it was the voice of Petitioner on the April 12th tape (T. 635-639).

Paul Ginsberg, an engineer whose specialty is clarification and enhancement of the intelligibility of audio tape evidence, was the Government's next witness. Ginsberg stated that he had listened to the tapes recorded by Reeves and that in his opinion, these

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[8]Wher confronted on cross-examination with his own Kel transmission, DeRosa, incredibly, told the jury that he was "lying" to Reeves when he told Reeves that he had not seen Petitioner enter the Club on April 12 (T. 492, 508-510, 518-520, 606-613).

were "normal" Nagra recordings which had not been manipulated (T. 706-707). Ginsberg conceded, however, that he had made no independent analysis to determine if the voice on the tapes attributed by the Government to Petitioner was, in fact, Petitioner's voice (T. 710-712).

Following Ginsberg's testimony, the Government rested and counsel for the defense moved *inter alia* for a directed judgment of acquittal pursuant to Rule 29 (a) of the F.R.Cr.P. (T. 718-719). Although the District Judge initially reserved decision on Aiken's motion to dismiss, the motion was ultimately denied (T. 719-720, 1122-1123).

3. The Defense's Case

Arnold Weiss, an attorney, was the first witness called by Petitioner. Weiss stated that he was requested by Petitioner's counsel to transcribe the tapes furnished by the Government to the defense, as required by the rules on discovery (T. 792). He listened to the tapes eight or ten times and prepared transcripts of the conversations allegedly recorded by Reeves on April 12 and 18, which transcripts, like those prepared by the Government, were received in evidence to aid the jury (DX-F, DX-G; T. 801, 807).

Weiss further testified that at the request of Petitioner's counsel he had, on five or six occasions, spoken with Petitioner for periods ranging from 10 to 30 minutes (T. 797). In his estimation, the voice ascribed to Petitioner by the Government on the tapes allegedly made by Reeves was undoubtedly not the voice of Petitioner (T. 797-807, 814-815).

John L. Pollok, an attorney specializing in criminal law with considerable experience in cases in this and other Circuits involving tape recordings, transcripts, and problems of voice identification, also testified for Petitioner (T. 1031-1034).

In March, 1980, Pollok was asked by Petitioner's counsel to retain the services of a voice identification expert. In that connection, Pollok contacted Dr. Oscar Tosi at Michigan State University and inquired of Tosi whether he would be able to assist the defense. Acting on Tosi's instructions, Pollok prepared an exemplar of the known voice of Petitioner. More particularly, Pollok directed Petitioner to come to his office. There, he directed Petitioner to read those portions attributed to Petitioner on the Government transcripts, which had been furnished pre-trial to the defense, into a tape recorder. When that was done, Pollok sent the exemplar along with the tapes of April 12 and 18, provided pre-trial by the Government to the defense, to Tosi for scientific analysis with the understanding that "we would have to take our chances by sending this to him and if he had negative findings as to our client, so be it" (T. 1039-1042).

The final witness for the Petitioner's defense was Dr. Oscar Tosi, the recipient of a Government grant to develop a system of voice identification or elimination, who had previously testified as an expert on behalf of the United States Attorney for the Southern District of New York in the seminal case of *United States v. Williams*[9] and who had testified as an expert in more than 100 cases in the United States, Canada, and Europe (T. 831-837).[10] In the case at bar, the Government did not, however, seek to retain Tosi (T. 962).

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[9]583 F.2d 1194 (2d Cir. 1978).

[10]Pursuant to his understanding of this Court's ruling in *Williams, supra*, at the urging of the Government, the Distrct Judge ordered that a voir dire be held to determine whether there was "sufficient reliability" to submit Tosi's scientific findings to the jury (T. 742). After evaluating Tosi's testimony, upon objection of the Government, the District Judge concluded that Tosi's testimony and demonstrative evidence must be limited to solely his aural analysis and no other scientific methods he had utilized upon the ground that results of Tosi's spectrographic and computer methods were too speculative within the context of Rule 702 of the Federal Rules of Evidence (T. 784-788, 853).

Adhering to the District Judge's voir dire ruling, Tosi testified that typically, as was done in the instant case by Pollok, the party wishing to retain him, whether it be the prosecution or the defense, prepares an exemplar of the known voice and forwards it to him together with copies of the tapes to be actually utilized at trial (T. 837, 985-986). Tosi then copies all the tapes sent to him on his own sophisticated equipment and after filtering and amplifying them prepares a series of loops -- *.i.e.*, "very short sentences" -- of all the voices involved. Ultimately, he aurally compares the known controlled voice of the speaker on the exemplar with the voice on the tapes to be offered at trial and proceeds on the basis of his expertise to reach a conclusion as to whether the voice on the tapes to be offered at trial is, in fact, the voice of the person to whom the spoken words have been attributed (T. 837-852). In reaching his conclusions, Tosi testified that he utilizes a scale of 10, with positive identifications ranging from zero to plus 10 and negative eliminations from zero to minus 10 (T. 852-853, 901-903).[11]

In the instant case, Tosi concluded that the unknown voice had absolutely no positive characteristics of Petitioner's voice. On the negative side -- *i.e.*, elimination -- he ascribed to the unknown voice a minus two which he stated, signified a "low percentage of elimination" (T. 853-855). Tosi further testified that in his expert opinion, it would be utterly impossible for anyone to make a reliable voice identification under the circumstances described by Government witnesses DeRosa and Ripandelli (T. 845-847).

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[11]On Tosi's scale, if he were absolutely certain of the identification of the unknown voice, he would use a positive "10" and if he were absolutely certain of the elimination of the unknown voice he would use a minus "10." In point of fact, Tosi testified that "10" is merely a "theoretical" number, and he never utilizes it (T. 852-853).

4. The Prosecution's Rebuttal Case

George Williams, a Drug Enforcement Agent, testified that he had worked undercover with the informant, Reeves (T. 1050). On April 18, 1979, he was in and around the 400 Club. At about 4:30 he saw Reeves arrive at the Club, stand in the doorway, and then enter the Club at about 5:50 (T. 1051-1053). Williams further testified that after Reeves went into the Club, he was forced to move his car. Upon returning to his position, he observed Reeves come out of the Club at about 6:10 and thereafter, saw Petitioner exit the Club (T. 1054-1055). He, however, did not see Petitioner enter the Club and did not see Reeves speaking to Petitioner, nor did he, Williams, ever meet with or speak to the Petitioner (T. 1086-1087).

Williams further testified that on March 29, 1979, he had occasion to go to the Club with Reeves in an undercover capacity to engage Petitioner in conversation (T. 1099). Petitioner was, however, not there. At the Club Reeves introduced him to Starckey as "George" and told Starckey that Williams was "a new guy" -- a courier for Reeves. Reeves asked Starckey if "Leon" was around and Starckey responded, "No." Reeves then told Starckey that they had come to pick up a "dope package" and Starckey responded that Petitioner would have the package around 11:30 that evening and he would bring it to Reeves (T. 1059-1060).

After all sides had rested, the defense moved for a directed verdict of acquittal. That motion was denied (T. 1123-1132).

Reasons for Granting the Writ

The effective assistance of counsel to defendants charged, as here, with serious crimes is guaranteed by the Sixth Amendment to the Constitution of the United States. Inherent in this fundamental safeguard is the notion that once the right to counsel has "attached," it must perforce remain untrammeled and unimpaired by the conduct of Government agents. Indeed, if the cherished constitutional right to the "assistance of counsel" is to have any value whatsoever, it cannot be construed to mean anything less than that.

Moreover, as this Court long ago aptly observed in the seminal case of *Johnson v. Zerbst*, 304 U.S. 458 (1938), "waiver" is an "intentional relinquishment or abandonment of a known right or privilege." Thus, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights" (304 U.S. 458, 464 (1938)).

In the instant case, the District Judge concluded that Petitioner's "right to counsel" had, in fact, "attached" but that he had nevertheless "waived" such right.

This petition, therefore, raises the decisive issue of whether under the circumstances of this case -- where there has been an unequivocal finding by the District Judge that the right to counsel has, in fact, attached -- there was, in fact, a valid "waiver" of such fundamental right.

Additionally, this petition concerns the recurring issue of the necessity for a preliminary *Wade-Stovall* type hearing where it is asserted that the methods utilized by the Government to identify Petitioner's voice on the tapes had been so unnecessarily suggestive, and hence, unreliable, as to violate his right to due process of law as guaranteed by the Fifth Amendment to the Constitution. As will be shown more fully below, in confronting this recurrent issue the federal courts are in conflict.

Argument

Point I

Petitioner's Sixth Amendment Right to the Assistance of Counsel Was Violated by the Failure of the District Court to Suppress Petitioner's Post-Arrest Statements.

Prior to trial Petitioner moved pursuant to F.R.Cr.P. 12(b)(3) and 18 U.S.C. § 3501 to suppress any post-arrest statements allegedly made by him upon the grounds that such statements were secured in violation of his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and in violation of his Sixth Amendment rights under *United States v. Satterfield*, 558 F.2d 655 (2d Cir. 1976). The motion was predicated upon Petitioner's own affidavit and that of his trial counsel (T. 95-96, 100). The Government responded with affidavits from Assistant United States Attorneys Denton, Cote, and Levites (T. 97-99, 101). On the basis of the motion, the District Judge held a suppression hearing and found the operable facts to be as follows:

> "In January, 1980, federal authorities swore out a complaint against Petitioner charging him with a violation of drug laws and, based on this complaint, obtained an arrest warrant for Aiken. In early February, 1980, Aiken retained Jay Goldberg, Esq. in connection with this unexecuted warrant. Petitioner provided Goldberg with the names of the federal prosecutor handling the case, Assistant United States Attorney Cote, and Detective John DeRosa, a detective who works for a New York State-Drug Enforcement Administration Joint Task Force. Goldberg called DeRosa and arranged for Aiken to surrender himself on February 5, 1980. Goldberg testified at the suppression hearing that he told DeRosa that Aiken should be questioned only as to pedigree, and that the authorities should avoid questioning Aiken concerning the charges

against him until arraignment on the complaint. Goldberg testified that he decided not to accompany Aiken during pre-arraignment procedures based on DeRosa's representation that the questioning of Aiken would be so restricted. Goldberg admitted that he spoke with Assistant United States Attorney Denton on February 4, and again with Denton on the morning of February 5, and that he made no similar request that Aiken not be questioned concerning the facts underlying the complaint. Goldberg denied knowing that the United States Attorney's office in this district has a practice of interviewing arrestees prior to arraignment concerning the charges against them, but admitted seeing an interview form used by the Office containing such questions.

"Detective DeRosa denied that Goldberg made any request on February 4, that questioning of Aiken be limited to pedigree, and denied either agreeing to such a request or transmitting such a request to Assistant United States Attorney Denton. Assistant United States Attorney Denton denied that he had ever received notice of any such request, either from DeRosa or from Goldberg.

"On February 5, 1980, Aiken surrendered himself to DeRosa at approximately 8:00 A.M. Police Officer Parker of the Joint Task Force read Aiken his *Miranda* rights. Aiken was processed according to standard procedures, and some bottles of medication were taken from him. DeRosa testified that he asked Aiken no questions concerning the charges against him because he expected the United States Attorney to question Aiken on that subject.

"Aiken remained in the custody of Joint Task Force officers until approximately 10:00 A.M. At that time DeRosa and Officers Ripandelli

and Parker escorted Aiken to Assistant United States Attorney Denton's office. Denton read Aiken his Miranda rights from the form customarily used in the United States Attorney's Office. Denton then asked Aiken standard questions concerning his background. Denton recorded Aiken's answers to his questions on the form. Denton then told Aiken that he had spoken with Goldberg, Aiken's attorney. He asked Aiken if he 'would like to answer some questions,' but reminded Aiken that he was under no obligation to answer any questions and could pick and choose which ones to answer. Aiken replied that he would answer questions. Aiken did not ask to call Goldberg and spoke without reservation. Both Denton and DeRosa, who was present throughout the interview, testified that Aiken appeared very calm and completely relaxed. Aiken did not ask for medication and told Denton that the State officers had treated him like a gentleman. Denton asked Aiken some questions concerning his background, family, and arrest record. Aiken volunteered the fact that he still owed twelve or thirteen years of parole on a prior conviction.

"Denton showed Aiken the complaint against him and Aiken read it carefully. Although Denton knew little about the case, he informed Aiken that the Government had 'several' tapes of Aiken discussing dope deals and that the Government's case was strong. He told Aiken that the Government was interested in obtaining Aiken's cooperation because Aiken had 'been around' and had useful contacts. Denton reminded Aiken of the twelve or thirteen years outstanding on the parole and asked him whether his parole was state or federal. When Denton learned that the parole was federal, he said something to the effect that 'we can talk about that.' Aiken responded that he was thinking about cooperation but

> wanted to think it over. He stated that he knew he was in trouble due to the twelve or thirteen years of parole remaining on his prior conviction. The interview ended at 10:20 A.M.
>
> "Officer Ripandelli escorted Aiken to the Pre-Trial Services office and then to the Magistrate's courtroom. Ripandelli testified that DeRosa never informed him that he was not to discuss the complaint with Aiken outside of Goldberg's presence but admitted that he knew Goldberg would be waiting in the Magistrate's courtroom. Ripandelli told Aiken that because he had surrendered, his bail situation would be better. Aiken then told Ripandelli, 'If I weren't so old, I'd still be running.' Ripandelli never informed Aiken of his *Miranda* rights.
>
> "After the arraignment before the Magistrate, Denton told Aiken, in Goldberg's presence to 'think about the possibility of cooperation. You can help yourself.' Goldberg was not aware of the prior interview with Denton" (T. 283-287).

From these facts, the District Judge concluded, as a matter of law, that

> "Although Aiken's Sixth Amendment right to counsel attached at the time of providing the statements, I find that he waived these rights" (A. 291)."[12]

Similarly, the Court of Appeals stated:

> "...(w)e agree with Judge Sweet's conclusion that Aiken's action would have constituted a waiver had the right to counsel attached. Aiken had been fully advised of his rights; was not under pressure or severe emotional strain; understood the significance of his situation, as suggested

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[12]On the basis of the Judge's ruling, DeRosa testified as to the statement Aiken allegedly made to Denton, "I know I am in trouble" (T. 435) and Ripandelli testified as to the comment Aiken allegedly made to him – "if he was any younger, he would still be running" (T. 635). On summation, the prosecutor contended these statements by Petitioner constituted consciousness of guilt (T. 868-869).

> by his three prior convictions on narcotics counts; and, notably, was not being subjected to interrogation 'for the very purpose of eliciting damaging admissions,' or to other forms of psychological coercion. Thus, we find no error in the admission of the statements." (Citations omitted (3a)).

For the reasons set forth below, we submit that the District Court and Court of Appeals erred by their refusal to suppress Petitioner's alleged post-arrest statements. Moreover, given the paucity of evidence adduced against the Petitioner, admission into evidence of these post-arrest statements could not, we submit, be deemed merely "harmless" error.

Inasmuch as the District Judge concluded that Petitioner's right to counsel had attached, the central issue to be resolved is whether Petitioner had waived his rights under the Sixth Amendment and not merely under the Fifth. *Brewer v. Williams*, 430 U.S. 387, 397-398 (1977); *Massiah v. United States*, 377 U.S. 201, 204-206 (1964). Several Courts of Appellate Jurisdiction have repeatedly cautioned that the distinction is crucial since waivers of Sixth Amendment rights are to be measured by a "higher standard" than are waivers of Fifth Amendment rights. *United States v. Satterfield, supra; United States v. Lord*, 565 F.2d 831 (2d Cir. 1977); *Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, 100 Sup. Ct. 1858 (1980). Indeed, several District Courts have decided that in light of *Satterfield* and its progeny, in order to obtain a valid waiver of Sixth Amendment rights once the right to counsel has attached, the Government must not only inform the defendant of the charges against him but must additionally advise the defendant of the manifest dangers of proceeding alone in the absence of counsel -- a procedure which, the District Judge concluded, was concededly not followed in the instant case. See for example, *Forman v. Smith*, 482 F.Supp. 941, 949 (W.D. N.Y. 1979); *United States v. Callabass*, 458 F.Supp. 964,

967 (S.D.N.Y. 1978); *United States v. Miller*, 432 F.Supp. 382, 388 (E.D.N.Y. 1977).

Most recently, in *United States v. Mohabir*, 624 F.2d 1140 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit reversed a criminal conviction upon the grounds that the Sixth Amendment rights of the defendant had been violated. In *Mohabir*, the Court took special pains to condemn the typical Government practice of conducting interviews once the right to counsel had attached -- as in the case at bar -- since "interviews of this type seem designed to elicit precisely the type of uncounseled confessions that appellant gave here" (624 F.2d 1150).

In the instant case, as in *Mohabir*, we submit that since the right to counsel had attached, there was likewise, no proper "waiver" of Sixth Amendment rights. Inasmuch as the Government concededly was aware that Aiken had retained counsel -- *at the very least* it had an absolute obligation to obtain the approval of his counsel prior to interrogating the Petitioner for what proved to be the precise purpose of obtaining uncounseled incriminatory statements. Absent such prior approval by counsel, as here, there could not, we submit, be a valid "waiver."

Most significantly, as the Court of Appeals for the Second Circuit, itself, noted in *Mohabir*, this is precisely what DR 7-104(A)(2) of the American Bar Association, Code of Professional Responsibility, mandates as an ethical consideration once a litigant has become represented by counsel, as here:

> "During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter *unless he has the prior consent of the lawyer* representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client" (footnotes omitted, emphasis supplied).[13]

Point II

Petitioner's Fifth Amendment Right to Due Process of Law Was Violated by the Failure of the District Court to Grant Petitioner's Motion for a Pre-Trial Hearing Concerning the Government's Voice Identification Procedures.

Prior to trial, Petitioner had asserted that the method utilized by the Government to identify his voice on the tapes -- *i.e.*, DeRosa and Ripandelli -- had been so unnecessarily suggestive, and hence, unreliable, as to violate his right to due process of law. *Neil v. Biggers*, 409 U.S. 188 (1972). He had, therefore, sought, pursuant to the F.R.Cr.P. 12(b)(3), a hearing to suppress both his in-court and out-of-court identification as it related to the tapes of April 12 and 18. At such hearing, the Government would be required to first meet the threshold issue of the admissibility of DeRosa's and Ripandelli's identification procedures.[14]

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[13]Inexplicably, in the instant case, the court below failed to even address the precepts of DR 7-104 in its opinion.

[14]Aiken's counsel relied upon an additional ground for the pre-trial admissibility hearing, which we continue to urge upon this Court:

> "Another ground for suppression of the identification is that it was conducted post initiation of a judicial proceeding, *Brewer v. Williams*, 430 U.S. 387; *Kirby v. Illinois*, 406 U.S. at 689, i.e. a complaint had been filed January 7, 1980 and the arrest took place February 5, 1980. Any such identification was required to be in the presence of counsel. *United States v. Wade*, 388 U.S. 218" (A. 104).

Only then, he contended, could the triers of the facts be properly asked to pass upon the accuracy of his identification by DeRosa and Ripandelli (T. 60, 64, 103-104).

The Government opposed Petitioner's motion upon the grounds that "(w)hatsoever the law may be elsewhere, it is clear in this Circuit that Aiken is simply not entitled to a *Wade-Stovall* type hearing..." (T. 89-92). The District Judge thereafter denied Aiken's motion (T. 106-113), and the court below affirmed, relying upon "the settled law of this Circuit" (4a). These rulings, we submit, constituted reversible error.

In *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977), on facts not unlike those at bar, the Court found the pre-trial identification procedures utilized by the Government to identify the defendant in a tape-recorded conversation to be so unduly suggestive as to require a preliminary determination as to admissibility. The Court thus stated:

> "The pre-trial identification procedure challenged on the appeal is unusual, involving an auditory rather than a visual identification of the defendant . . .Because the possibility of 'irreparable misidentification' is as great when the identification is from a tape recording as when it is from a photograph or a line-up, we hold that the same due process protection should apply to either method." (544 F.2d 368-369).

See also *United States v. Basey*, 613 F.2d 198 (9th Cir. 1979); *United States v. Kim*, 577 F.2d 473, 481-482 (9th Cir. 1978); *People v. Singleton*, 83 M.2d 112 (1975).

Notwithstanding the fact that the Second Circuit has heretofore declined to accept the *Pheaster* Rule,[15] we submit that inasmuch as in the instant case DeRosa and Ripandelli had so inevitably focused upon Petitioner prior to his surrender on February 5, 1980 – at which time they allegedly made the identification of his voice -- a pre-trial hearing should have been held as to the threshold issue of the admissibility of the agents' identification testimony as mandated by the consistent rulings of the Ninth Circuit.

As exemplified by the conflict between Circuits, the federal courts are wholly lacking in authoritative guidance from this Court in dealing with this recurring issue. This case, we submit, presents the perfect vehicle for this Court to provide such guidance.

Conclusion

For the foregoing reasons, it is hereby submitted that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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[15]See for example, *United States v. Armedo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Albergo*, 539 F.2d 860 (2d Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976). But see *United States v. Moore*, 571 F.2d 76 (2d Cir. 1978), where this Court applied due process standards to a voice identification.

APPENDICES

Appendix A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Stated Term of the United States Court of Appeals, in and for the Second Circuit, the United States Court House, in the City of New York, on the 10th day of November, one thousand nine hundred and eighty.

Nos. 80-1302, 80-1310

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,
Circuit Judge

HONORABLE LAWRENCE W. PIERCE,
District Judge

UNITED STATES OF AMERICA,
Appellee,

-against-

LEONARD AIKEN, a/k/a "Leon" and BENJAMIN STARCKEY, a/k/a "Skippy,"
Defendants-Appellants.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix A

Opinion of United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel for appellant Aiken and submitted by counsel for appellant Starckey and argued by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Leonard Aiken and Benjamin Starckey appeal from their convictions, after a jury trial before Judge Robert W. Sweet in the United States District Court for the Southern District of New York, on an indictment charging them with conspiracy to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. § 846. Following their convictions, Aiken was sentenced to 20 years imprisonment, a term he is presently serving. Starckey, sentenced to six and one-half years, is currently free on bail.

Aiken first challenges the admission of certain statements made after his arrest but before his indictment or arraignment. After a warrant was issued for his arrest, Aiken arranged through his counsel for a voluntary surrender. Upon his surrender, the arresting agents gave Aiken his *Miranda* warnings, which were subsequently repeated by an Assistant United States Attorney; in addition, Aiken was given a copy of the complaint on which the warrant was based. The Attorney in charge then proposed that Aiken cooperate, telling him that "we got you good; we got you on two or three tapes talking dope deals." Aiken said in response, "I know I am in trouble." Later, as Aiken was being taken for arraignment, the officer accompanying

him commented that Aiken's surrender was a point in his favor. Aiken replied, according to the officer, that if he had been "any younger he would still be running."

The district judge held that Aiken's right to counsel had attached at the time of these statements, but concluded that the government had borne its "heavy burden" of showing waiver of the right. We note that this holding goes beyond our decision in *United States v. Mohabir*, 624 F.2d 1140 (2d Cir. 1980); however, we find it unnecessary to determine whether the district court's reasoning was correct and its holding warranted. In *United States v. Duvall*, 537 F.2d 15, 22 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976), we saw "no reason in principle why the filing of a complaint should be deemed to give rise to a right to counsel immediately upon arrest pursuant to warrant." *Duvall* remains the law in this Circuit. In any event, we agree with Judge Sweet's conclusion that Aiken's actions would have constituted a waiver had the right to counsel attached. Aiken had been fully advised of his rights; was not under pressure or severe emotional strain; understood the significance of his situation, as suggested by his three prior convictions on narcotics counts; and, notably, was not being subjected to interrogation "for the very purpose of eliciting damaging admissions," see *Duvall, supra*, 537 F.2d at 24, or to other forms of psychological coercion. See *United States v. Lord*, 565 F.2d 831, 839-40 (2d Cir. 1977). Thus, we find no error in the admission of the statements.

Aiken also asserts that the court erred in refusing to permit testimony by his voice-identification expert regarding two of the methods he used to determine whether Aiken's voice was actually on a tape recording introduced by the government. We do not believe that

Judge Sweet abused his discretion, under Fed. R. Evid. 702, to exclude such testimony as too speculative and potentially confusing to the jury. Our decision in *United States v. Williams*, 583 F.2d 1194 (2d Cir.), *cert. denied*, 439 U.S. 1117 (1979), does not preclude such a determination by the trial court. *Williams* found the technique of spectrographic analysis generally of sufficient reliability to permit the admission of evidence derived by the technique, but by no means prohibited a finding in a particular case that such evidence was inconclusive or unreliable. See *id.* at 1200 n. 12.

We also reject Aiken's contention that he was prejudiced by the government's questioning of his voice-identification expert during re-cross-examination, which elicited testimony that the expert had performed spectrographic and computer tests as well as the simple aural testing to which his direct testimony was restricted. This testimony did not open the door to full disclosure of the results of those tests in spite of their inconclusiveness, and we are satisfied that Judge Sweet's warning to the jury on the limited effect to be given the admitted testimony minimized any risk of misunderstanding.

Finally with respect to the tapes, we see no error in Judge Sweet's determination that Aiken was not entitled to a pre-trial hearing on whether the government's method of identification of the voices on the tapes was "unnecessarily suggestive" and thus unreliable, in violation of his right to due process. Under the settled law of this Circuit, the adequacy of the identification of recorded voices bears on the weight, rather than the admissibility, of evidence of this kind. *See, e.g., United States v. Armedo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977). *Cf. United States v. Moore*, 571 F.2d 76, 90-91 (2d Cir.

1976) (suggestive circumstances of identification may bear on admissibility of testimony as to identity of nonrecorded voice).

Aiken also maintains that the court erred in not permitting the introduction of evidence of prior convictions of the government informer who had recorded the tapes, to support Aiken's contention that the informer had a "decided motive" to fabricate the incriminating conversation or to tamper with the tapes. Again, we disagree. The fact that the informer was cooperating with the police following his own arrest for possession of heroin was made known to the jury, and Aiken was free to suggest that the informer's desire to keep himself out of prison gave him a motive to try to frame Aiken. Under the circumstances, there was no abuse of discretion in excluding the essentially cumulative evidence of the informer's prior convictions.

We have reviewed Aiken's claims with regard to the court's instructions concerning the voices on the tapes and find them without merit.

Appellant Starckey makes two claims. The first, that the circumstances under which his voice was identified as one appearing on the tapes were impermissibly suggestive, must be rejected for the same reasons already discussed in connection with Aiken's similar claim. Starckey's second assertion, that the testimony of one of the police agents "can only be viewed as perjured," is wholly without support.

Accordingly, we affirm the judgments of conviction.

Appendix A

Opinion of United States Court of Appeals

/s/ _____
WILFRED FEINBERG,
Chief Judge

/s/ _____
THOMAS J. MESKILL,
Circuit Judge

/s/ _____
LAWRENCE W. PIERCE,
District Judge

Appendix B
Constitutional Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.